



LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT
Department of Planning, Preservation & Development
Division of Planning

Jim Gray
Mayor

Derek J. Paulsen, Ph.D.
Commissioner

January 18, 2013

STAFF REPORT

RE: Board of Adjustment Revocation Hearing
Con Robinson Contracting Co., Inc.
Commercial Composting Conditional Use/C-90-45
4247 Georgetown Road

Zoning Ordinance Provisions

Article 1-11 defines “commercial composting” as: “The aerobic or anaerobic decomposition of solid, organic materials to produce a stabilized, humus-like material that can be recycled to the land as a soil conditioner and low grade fertilizer, and primarily for use or distribution off the production site”.

Article 8-1(d)6 states that commercial composting is permitted in the Agricultural Rural (A-R) zone as a conditional use, subject to approval by the Board of Adjustment and compliance with the following conditions: (a) that only the open windrow or static pile method of aerobic processing using plant material, soils and animal manure, be permitted; (b) that a permit-by-rule or letter of intent from the Division of Waste Management of the Kentucky Natural Resources and Environmental Protection Cabinet be obtained prior to submission of any application to the Board of Adjustment for a conditional use permit; (c) That no commercial composting operation be conducted closer than one thousand (1,000) feet to any existing residence; (d) that a development plan indicating access points and circulation routes, proposed signage, screening and landscaping, fencing and other significant geological or physical features of the property be submitted as part of any application; and (e) that the Board specifically consider and be able to find that the proposed use will not constitute a public nuisance by creating excessive noise, odor, traffic or dust.

Article 1-11 defines “quarrying” as: “Surface excavation for the extraction of any non-metallic mineral, excluding coal, which is produced for sale, exchange, or commercial use”.

Article 8-1(d)14 states that mining and/or quarrying of non-metallic minerals is permitted in the A-R zone as a conditional use subject to approval by the Board of Adjustment. Any such proposal must comply with the requirements of the Mining/Quarrying Ordinance (Code of Ordinances #252-91) and the conditions and requirements as set forth therein. The Board of Adjustment shall specifically consider and be able to find: (a) that the proposed use will not constitute a public nuisance by creating excessive noise, odor, traffic, dust, or damage to the environment or surrounding properties; (b) that a reasonable degree of reclamation and proper drainage control is feasible; and (c) that the owner and/or applicant has not had a permit revoked or bond or other security forfeited for failure to comply with any Federal, State or local laws, regulations or conditions, including land reclamation, pertaining to the proposed use.

H O R S E C A P I T A L O F T H E W O R L D

Background

A conditional use for a commercial composting operation at this property was approved by the Board of Adjustment on April 27, 1990 (case number C-90-45). The property consists of a 115-acre farm located on the west side of Georgetown Road, about ½-mile south of Iron Works Pike. The entire farm is in the Agricultural Rural (A-R) zone. The area approved for composting is limited to a 22-acre site at the center of the farm.

Although a wide variety of materials and methods can be used for composting, in this particular case composting consists primarily of using horse muck (a mixture of animal waste and bedding material such as straw or sawdust) generated from local farms. At least initially, composting consisted of placing horse muck (with bulking agents such as wood chips added at times) in long rows where the material is turned periodically by machinery that moves along the rows. This method is known as open windrow aerobic processing.

Commercial composting at this site was actually initiated in 1987, about three years prior to the Board's approval and at a time when commercial composting was not identified in the Zoning Ordinance as a permitted use in the A-R zone. During that three year window of time a number of appeals and related court actions were undertaken, and a 13-member committee was appointed by the Mayor to study the issue of commercial composting in Fayette County. The Zoning Ordinance was ultimately amended to include commercial composting as a conditional use in the A-R zone, subject to a number of conditions related to the type of composting allowed, setbacks, permitting requirements at the State level and the need to address potential public nuisances associated with excessive noise, odor, traffic and dust.

Conditions Adopted by the Board of Adjustment

The Board's approval of a commercial composting facility at this location in 1990 was subject to seven conditions, as follows:

1. That the proposed commercial composting be operated in accordance with the submitted development plan to be amended to show the following: (a) location of the employee mobile home; (b) locate 30-foot wide buffer around 22-acre site; (c) Correctly show existing fencing on the property; (d) add notes to plan concerning all aspects of the composting operation, site, transportation, date of Permit-By-Rule approval, odor, dust, erosion control/grading, insect and rodent control, well and pond information, and distance from residences in the area.
2. That no sign be erected on the subject property.
3. That the composting area be limited to a 22-acre site in the center of the 115-acre farm.
4. That the entrance to the property be chained off at the close of operating hours.
5. That no storage of semi-trailer trucks be permitted on the subject property.
6. That upon the revocation of the permit issued by the State Division of Waste Management, the conditional use will cease.
7. That the entrance and interior drives will be paved within twelve (12) months.

The development plan submitted with the original conditional use application was amended to show various operational details, as required by condition #1. However, there are at least two critically important aspects of the amended plan that are not being complied with, relating to the **extent of excavation and grading** that has been conducted and the **method of composting** that is being undertaken within the 22-acre site.

Interwoven with these compliance issues is the fact that Con Robinson Contracting Co., Inc. has been conducting unauthorized quarrying activities from 2007 to the present, and either operated or allowed to be operated an unauthorized recycling facility for several years between 2008 and 2010, all within the 22-acre area that was supposed to be used for composting.

Extent of Excavation and Grading

At some time between 2002 and 2007 a major excavation project was initiated within the 22-acre site. Aerial photos taken in 2007 confirm that excavation was well underway by then, and a site visit in October of 2008 documented the presence of heavy construction equipment and numerous large piles of dirt and processed and unprocessed rock. This activity, which at times required the use of explosives, resulted in substantial changes in elevation, up to 22' reductions at some locations, and several acres of exposed bare rock where topsoil had been completely removed. Large quantities of rock have been processed by grinders to produce a marketable product, much of which has been sold and moved off the property. Top soil has been stockpiled and also sold periodically. This work was initiated without the benefit of a non-coal mining permit from the State or a land disturbance/grading permit from LFUCG's Division of Engineering, or an amended conditional use from the Board of Adjustment. An after-the-fact grading permit was issued by the Division of Engineering on November 18, 2008.

In the commercial composting conditional use application submitted to the Board in 1990 there was no mention of any excavation activity that would be taking place. In the Operations Plan section of the application, under Erosion Control/Grading, there was a note that "windrows are only placed in areas with 5% or less slope" and that "Areas with 5% or greater slope located in the composting field will gradually be regraded to conform to the 5% requirement". When that aspect of the Operations Plan was transferred to the amended development plan per condition #1 of the Board's approval, a note was added that states "**Regrading will be minimal...**".

It is clear that the level of excavation and grading that has taken place far exceeds what could reasonably be interpreted as minimal. In this light it is important to understand that there is a significant difference in what is commonly meant by the terms "regrading" and "excavation". With regrading, the slope of the land is changed but the rock and dirt material for the most part remains. Regrading often takes place without the need to disturb the underlying rock layers at all. Simply put, the material is moved around to create a desired slope. With excavation, rock and/or dirt material is actually removed, which is what has taken place at this site. **The Board's 1990 conditional use approval permitted minimal regrading but not excavation.**

Due to the scope of excavation that has taken place, and the fact that processed rock as well as dirt was being transported off the property for commercial purposes, the activity is considered a non-coal mine by the State and a quarrying operation by local government as defined in Article 1-11 of the Zoning Ordinance. A non-coal mining permit has never been obtained from the State, and a Notice of Non-Compliance was issued to Con Robinson on July 29, 2010, directing him to immediately stop hauling processed limestone rock off the construction site and to obtain a non-coal mining permit or reclaim the entire mining disturbance to meet non-coal mining reclamation standards. Mr. Robinson was advised by local government in 2010 that he needed to obtain a conditional use for his quarrying operation. He applied in late September 2010 but his request was disapproved by the Board at the October 29, 2010 public hearing (C-2010-99). At that hearing there was substantial testimony from various entities alleging disturbances and property damage from blasting vibration and dust.

In late September of 2012 the Zoning Enforcement section of the Division of Planning received a complaint that topsoil was being sold and trucked off site from the subject property at 4247 Georgetown Road. An

inspector met Mr. Robinson on site and was told that dirt was not being sold, and no trucking activity was observed at that time. Another complaint was received in late October 2012. This time the inspector followed two trucks leaving the property loaded with dirt to a construction site on Newtown Pike where an official with the construction company working there verified that fill dirt was being purchased from Mr. Robinson. A Notice of Violation was subsequently issued to Mr. Robinson directing him to immediately cease selling, exchanging or using quarried material for any commercial purpose. Enforcement staff met with Mr. Robinson on site at his request on November 19, 2012 to discuss the Notice of Violation and review his composting operation. The very next day another complaint was received that trucks were still moving dirt off the site. That day an inspector followed trucks loaded with dirt to a different construction site, where Mr. Robinson arrived shortly thereafter and verified that dirt was being sold to that business. **These events confirm that the illegal operation of a quarry from the subject property has continued since the Board's disapproval of the conditional use request in October of 2010.**

Method of Composting

Note #2 on the amended development plan identifies **open windrow aerobic composting** as the method of composting to be undertaken. Under this method the horse muck and other raw material to be composted is deposited in rows with an initial height of about 5' and width of 10'. The material is then turned every few days, by mobile machinery that moves along the rows, to provide aeration and control temperature and moisture levels. If properly managed, after four to sixteen weeks a useable product is produced that can be sold to homeowners and landscaping companies.

In June of 2008 Con Robinson Contracting Co., Inc. notified the State Division of Waste Management that a different method of composting was now being used, because the windrow method was very time consuming and used a tremendous amount of space. The new method, which was initiated without requesting an amendment to the conditional use permit, involves the use of a stationary tub grinder with an 860 horsepower engine that processes piles of raw material rather than rows. According to the letter submitted to Waste Management, dated June 26, 2008, it is claimed that this new method is much more efficient and can be undertaken on a very small footprint.

This distinction between much different composting methods is not trivial. With windrow processing, the machinery used to turn the material, described in the conditional use application as a "Scarab composter", led the staff to conclude that "the noise generated by this use would be no more than that associated with any farm machinery", as stated in the staff report submitted to the Board at the April 27, 1990 hearing. A subsequent finding adopted by the Board at that hearing stated that "the noise would be no more than that of farm machinery". The 860 horsepower tub grinder is not the type of machinery typically found on a farm, and generates substantial noise likely to far exceed that of typical farm machinery.

Regardless of the pros and cons and relative merits of different methods, the fact of the matter is that the revised method of composting has not been reviewed or approved by the Board. Further, it does not appear that this revised method even complies with the Zoning Ordinance requirement that commercial composting in the A-R zone only use either the open windrow or static pile method of aerobic processing. Static pile aerobic processing typically requires that the raw material be placed over a system of pipes with a ventilation system to provide aeration. It is the staff's opinion that simply **placing the raw material in piles and grinding it with a tub grinder does not constitute "static pile aerobic processing" as that term is commonly used.**

Despite the fact that the method of composting was changed to be more efficient, and substantial areas of hard and relatively flat surfaces were created to accommodate (according to Mr. Robinson) composting operations, the amount of material composted at this 22-acre site has actually declined dramatically over the

past few years (see Table 1). From 1994 through 1998 between 1,700 and over 5,000 tons of raw material per year was being processed. For reasons unknown to the staff, from 2003 through 2006 no composting at all took place. When composting resumed in 2007 the annual amount of material processed per year through 2011 has always been less than 500 tons, which is a tiny fraction of the 50,000 to 80,000 tons per year that was projected by Con Robinson Contracting Co., Inc. in the original conditional use application. In contrast, a similarly sized commercial composting facility operated by Creech Services (approved in 2001/C-2001-1) on Hedger Lane at the old Lexington landfill off of Haley Pike has processed between 7,400 and 15,000 tons of composting material per year during that same time period. The extremely low levels of composting taking place raise serious questions as to what is sustaining the business operation at this location, which is an especially relevant question given the levels of unauthorized recycling and quarrying activities that have occurred.

Reclamation

Given the extensive excavation that has taken place on this farm, and removal of large quantities of rock and soil that has created several acres of barren surfaces, a legitimate question is how the land is going to be restored. In the original conditional use application, under a short section titled as “Closure Plan”, it is stated that “Closure of the composting site shall entail removing all compost from the site, and reseeded the land”. Since the original application also contemplated only minimal regrading of the land, with no removal of soil, it was entirely reasonable and feasible that restoration would be as simple as reseeded. Unfortunately, because unauthorized excavation and removal of soil has been so extensive, there are serious questions as to the methods and overall feasibility of returning this site to a pre-composting condition.

Should the Board make a decision to revoke the composting conditional use there will need to be an understanding at some point as to what is required in terms of reclamation and restoration. It appears that a collaborative effort will be needed to prepare a conceptual plan, with critical participants including the LFUCG Divisions of Engineering, Water Quality and Planning and the Kentucky Department for Environmental Protection. Once such a conceptual plan is developed it would be presented to Con Robinson Contracting Co., Inc. as local and State governments position as to what is legally required in terms of reclamation and restoration for this property to be in total compliance with all applicable rules and regulations.

Conclusions & Recommendations

It is clear that what has actually taken place at this property is much different than what was originally envisioned by the Board when the conditional use for a commercial composting facility was approved in 1990. Given the level of noncompliance that has been documented, both with respect to conditions adopted by the Board as well as other activities that were simply not authorized (recycling and quarrying), the staff can find no reasonable option to pursue other than proceeding with revocation of the conditional use.

Amending the conditional use is not a workable option for several reasons. For all practical purposes the 2010 after-the-fact request for a quarrying conditional use was an effort to amend the conditions under which the composting operation could be undertaken. That request was disapproved by the Board at the October 29, 2010 public hearing (C-2010-99: Con Robinson). Further, taking any action that increases the possibility of continued quarrying or other unauthorized activities taking place under the guise of operating a commercial composting facility would be ill-advised. Since all of the activities are taking place within the same 22-acre site, and are closely intermingled, it is not feasible to treat the activities separately with different enforcement approaches for each.

Every effort has been made to reasonably reconcile what has taken place with what the Board approved in 1990. Such reconciliation is always challenging when a particular entity has a pattern of initiating activities before all of the required permits and related approvals are obtained (see Table 2). Also, much of the information and the explanations for why certain activities took place are contradictory. Most notably, on the one hand a new method is used (the 860 horsepower tub grinder) that apparently needs a greatly reduced working footprint, yet on the other hand a claim is made that more useable working area is needed and that's why such extensive excavation and quarrying was initiated. Also, the actual amount of composting material processed over the past few years does not support any increased efficiency or productivity, as there has been a sharp decline in material processed despite the operational changes that have been largely implemented.

The staff recommends that the Board proceed with revoking conditional use C-90-45, for the following reasons:

- a. Excavation and grading within the 22-acre composting site has far exceeded what was authorized by the Board when the commercial composting conditional use was approved for Con Robinson Contracting Co., Inc. on April 27, 1990 (C-90-45). As noted on the approved development plan (note #12), only minimal regrading was to be undertaken. Actual grading has been extensive (often facilitated by use of explosives) and is more appropriately described as excavation, resulting in elevation changes of up to 22' and removal of rock and dirt material.
- b. The open windrow method of composting, required by note #2 on the approved development plan, was abandoned on or about June 26, 2008 and was replaced by use of an 860 horsepower stationary tub grinder. The grinder processes raw material from large piles rather than rows, and the piles are not aerated by pipes or other ventilation systems. This method of composting was not contemplated with the Board's 1990 conditional use approval and does not qualify as either open windrow or static pile aerobic processing, which are the only two methods allowed per Article 8-1(d)6.a. of the LFUCG Zoning Ordinance.
- c. Much of the 22-acre site that was supposed to be used for composting has been used for illegal quarrying and recycling activities for extended periods of time. Quarrying activity has continued up to the present time (November 2012) despite the Board's disapproval on October 29, 2010 of a conditional use request for a temporary quarry (C-2010-99: Con Robinson).
- d. Staff observations on site and very low volumes of composting material processed as reported by the State Division of Waste Management support that very little of the 22-acre site has actually been used for composting over the past ten years. Continued operation of a low volume composting facility within a 22-acre area that has been extensively disturbed by unauthorized excavation, quarrying and non-coal mining activities will lead to on-going enforcement problems, and ultimately complicate and compromise efforts to restore the land to a minimally altered condition as prescribed by the Board's 1990 approval of a conditional use for commercial composting. Given the extent of unauthorized activity that has taken place within this 22-acre site, immediate and uncompromised efforts need to be taken to begin the reclamation and restoration process.

JMM/CDK
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